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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-432

ARTHUR COBB,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALBERT J. KRIEGER
Attorney for Petitioner Arthur Cobb
Office & P. O. Address
401 Broadway
New York, New York 10013
(212) WA 5-5937

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To The Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Arthur Cobb, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment entered against him on August 12, 1971.

A.

The Opinion Below

On August 12, 1971, the Petitioner's appeal to the United States Court of Appeals for the Second Circuit was affirmed and a copy of the Opinion is annexed hereto and marked as Appendix A.

B.

Jurisdiction

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by Writ of Certiorari is sought of a judgment of the affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C.

Question Presented

1. Whether the trial court's failure to instruct the jury in regard to testimony of an admitted perjurer after having advised defense counsel that it would do so and after defense counsel relied on that ruling in his summation constituted reversible error.

D.

Constitutional Provisions, Statutes, and Rules

The Amendment involved is:

Fifth Amendment

The Statutes involved are:

Title 26, United States Code, Section 7206(2)
Title 28, United States Code, Section 1254(1)

The Rule involved is:

Rule 30 of the Federal Rules of Criminal Procedure.

E.

Statement of the Case

The Petitioner, Arthur Cobb, was charged together with one Abraham Goldstein with violations of Section 7206(2) of Title 26, United States Code, and with conspiracy. After a trial before a jury the Petitioner was convicted on the conspiracy count and on one of the substantive counts and was acquitted on another substantive count, the jury disagreeing as to the remaining twelve substantive counts.

The petitioner Cobb was sentenced to a six month term of imprisonment on the conspiracy conviction and was placed on five years probation. The prosecution below related to a form of pari mutuel horse race betting known as the "twin-double". The object of this form of betting was to correctly predict the winners of each of four successive races. The bettor would first purchase a ticket in which he would predict the winner of two successive races. If his two predictions were correct he would have what was called a "live ticket" which would then be transferred for a second ticket in which he would attempt to predict the winners of the next two successive races. If the bettor's last predictions were accurate he would win the twin-double and take

this second ticket to a cashier's window where he would present the ticket for payment. In order to cash his ticket the player would have to fill out a "verification slip" wherein he would give his identity and address. This verification slip was used by the race track to prepare Internal Revenue Service Form 1099 in order to obtain proper information for the collection and filing of income taxes. The gist of the offense charged below was that the Petitioner Cobb and others participated in a scheme whereby persons other than the true owners of winning tickets would cash such tickets and fill out such verification slips in order to conceal the true identity of the winner of the tickets and thereby minimize federal tax liabilities.

ARGUMENT

The Trial Court's failure to instruct the jury in regard to testimony of an admitted perjurer after having advised defense counsel that it would do so and after defense counsel relied on that ruling in his summation constituted reversible error.

The only critical evidence admitted against the Petitioner Cobb at the trial below came from the testimony of two accomplices to the ticket cashing scheme, Lawrence Strauss and Lawrence Siovitz. The thrust of their testimony was that they cashed winning twin-double tickets that were not their own for the Petitioner Cobb and his co-defendant Goldstein. Both Strauss and Siovitz had admitted during the trial that they had perjured themselves in prior testimony. Accordingly, trial counsel for Cobb prior to summation requested of the Court that the Court include the following in its charge to the jury:

> "The testimony of an admitted perjurer should always be considered with caution and weighed with great care."

The trial Court ruled in favor of this request and counsel relied heavily on the Court's ruling in his summation:

> "The Court is going to tell you, apply your common sense. Judge the witness as you would judge any person you would meet in your normal relationships with people. Apply the tests that you would apply in the more important and weighty of your affairs. And the Court will also say to you, if you can conclude that a witness has knowingly testified falsely concerning any material matter, you have a right to distrust that witness' testimony in other particulars. You may rejedt [sic] all the witness' testimony or give it or parts of it the credence you think it deserves. And his Honor will also tell you all testimony of an admitted perjury should always be considered with caution and weighed with great care.
>
> * * *
>
> I respectfully suggest to you, ladies and gentlemen, that if you apply the tests of credibility that his Honor will give you, if you remember that the man is an admitted perjurer, you will find that there has been no evidence from Strauss which would tend to erode the presumption of innocence that shields Cobb.
>
> * * *
>
> Well, I am really sorely tempted to read to you again that instruction which I believe his Honor will give you, that all testimony of an admitted perjurer should always be considered with caution and weighed with great care. But it really isn't fair to the case to dismiss Mr. Siovitz in just that fashion.

> His Honor, I expect, is going to charge you on two principles of law. This will be in discussion of assessing the credibility of witnesses because, ladies and gentlemen, it is obvious if you do not believe Strauss and you are to reject his testimony, his testimony would not be credible, his testimony would not be considered worthy of that level of appreciation by you where you could use it to determine guilt beyond a reasonable doubt."

In its final charge to the jury, however, the Court did not give the instruction previously requested but rather gave the following:

> "As you contemplate the testimony before you of a confessed perjurer, I would suggest you might consider whether he presented an instance of purge, p-u-r-g-e or perjury. Was his testimony induced by a genuine desire to purge or cleanse himself of past transgressions and make amends, or did he renew the false swearing indulged in before? In other words, to use the vernacular, did he come clean before you?"

Immediately after the Court had concluded its charge, trial counsel for Cobb specifically excepted to the charge with regard to the testimony of an admitted perjurer and specifically repeated its request for the instruction initially ruled upon by the Court.

Furthermore, Rule 30 of the Federal Rules of Criminal Procedure can be fairly well read to indicate that counsel had a right to rely on the Court's ruling that it would instruct as requested. The Court's failure to so instruct was compounded by the instruction actually given. Rather than caution the jury against the unreliability of the testimony

of such a witness, the Court's instruction had almost the opposite effect. The Petitioner would have been better off with no instruction on the testimony of an admitted perjurer than the one actually charged.

The Petitioner was entitled to the instruction requested. *United States* v. *Margolis,* 131 F. 2d 1002; *Levine* v. *United States,* 261 F. 2d 747; *Perez* v. *United States,* 297 F. 2d 12.

Since defense counsel had properly requested a proper charge, since the Court granted the request, since counsel relied on that ruling extensively in his summation and took exception after the Court had failed to so instruct, and since the substance of this request related directly to the sole theory of defense, the Petitioner must be granted a new trial.

In conclusion, we respectfully submit that this Petition raises an issue of great significance with respect to the administration of federal, criminal justice. The Federal Rules of Criminal Procedure afforded, as indicated here, certain procedural relief to a defendant and his counsel. Trial counsel sought to avail himself of that procedural relief and made an application which was granted by the Court. In reliance thereon counsel made certain significant arguments in his summation to the jury only to have the Trial Court, without notice, reneg upon its prior ruling. Counsel in a federal, criminal proceeding must be able to rely on the Court's rulings if he is to be able to afford the defendant a proper defense.

CONCLUSION

For the reasons here and above set forth this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ALBERT J. KRIEGER
Attorney for Petitioner
Arthur Cobb

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1030—September Term, 1970.

(Argued July 2, 1971 Decided August 12, 1971.)

Docket No. 71-1391

UNITED STATES OF AMERICA,

Appellee,

—v.—

ARTHUR J. COBB,

Defendant-Appellant.

Before:

FEINBERG and MANSFIELD, *Circuit Judges,* and BARTELS, *District Judge.**

Appeal by Arthur J. Cobb from a judgment of conviction for conspiring to defraud the United States and for violation of Section 7206(2) of Title 26, United States Code, entered on March 4, 1971 in the United States District Court for the Southern District of New York (Judge Cooper) after an eight-day trial before a jury.

Affirmed.

* Of the Eastern District of New York, sitting by designation.

IVAN S. FISHER, Esq., New York, N. Y. (Albert J. Krieger, Esq., New York, N. Y., on the brief), *for Defendant-Appellant.*

HOWARD WILSON, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, and William B. Gray, Assistant United States Attorney, New York, N. Y., on the brief), *for Appellee.*

BARTELS, *District Judge*:

Under a fourteen-count indictment, Arthur J. Cobb was convicted together with his co-defendant, Abraham Goldstein, of conspiracy to defraud the United States in the ascertainment and collection of certain information used by the Internal Revenue Service in determining tax liability of the defendants and others, and also of violation of 26 U.S.C. §7206(2), in procuring and causing the preparation and presentation of fraudulent and false United States Information Returns (Form 1099). Count 1 charged both Cobb and Goldstein with conspiracy to defraud the United States and to violate 26 U.S.C. §7206(2) from August 1, 1964 to October 16, 1970, and Counts 2 through 14 charged Cobb and Goldstein with the substantive offenses of advising and causing the preparation of false and fraudulent United States Information Returns (Form 1099) on thirteen occasions between August 21, 1965 and September 24, 1966, which misrepresented and concealed the names of the recipients of income from winning pari-mutuel twin double tickets at Yonkers Raceway. Cobb was convicted on Counts 1 and 4 and acquitted on Count 10, the jury dis-

agreeing on the remaining counts, and Goldstein was convicted on all counts except Count 10. Cobb was sentenced to imprisonment for six months and to probation for five years on Count 1, and sentence was suspended on Count 4. Goldstein has not appealed.

At the outset it is instructive to describe the system devised by Cobb and Goldstein to avoid tax liability for the income received from cashing winning twin double tickets.[1] Upon redeeming a winning ticket in excess of $600, the ticketholder is required by the racetrack to complete a verification slip setting forth his name, address and Social Security number. The racetrack then files, in accordance with 26 U.S.C. §6041(a), a United States Information Return (Form 1099) with the Internal Revenue Service, containing the same information as the verificaiton slip. Thus the Internal Revenue Service is provided with a record of an individual's twin double winnings and can verify whether a taxpayer has reported all of his income in a particular year. To conceal from the Internal Revenue Service the true owners of the tickets and the actual recipients of the proceeds, Cobb and Goldstein concocted a scheme of selecting and engaging certain persons who had a sufficient number of losing tickets as "cashers" who would cash these twin double tickets in their own names and thus save the

[1] In 1964, 1965 and 1966 Yonkers Raceway and Roosevelt Raceway conducted a system of pari-mutuel betting known as the "twin double." Under this system, a bettor purchased a ticket which contained his choice of the two horses which would win the sixth and the seventh races. If the bettor's choices should win, the bettor had what was known as a "live" ticket which could then be exchanged at the betting windows for a second ticket which contained his choices for the eighth and ninth races. If the bettor's choices again won, he had a winning twin double ticket which could be cashed in at a cashier's window at the racetrack.

defendants, their principals and others from imposition of taxes upon the twin double winnings.

Cobb claims as error (1) the admission of certain testimony against him which was applicable only to Goldstein; (2) the submission to the jury as against him of the twelve substantive counts, and (3) the court's charge relative to confessed perjurers.

In order to determine the validity of Cobb's contentions, we believe it is necessary to briefly review the testimony and evidence. The Government's case rested essentially upon the testimony of three cashers, Lawrence Strauss, Lawrence Siovitz, and Irwin Steinberg, and also upon the testimony of an Internal Revenue Agent, Graham R. Schatz.

Strauss testified that he first met Cobb at Yonkers Raceway in the fall of 1964; that Cobb later told him that he was a partner of Goldstein and others dealing in twin doubles; that between the latter part of 1964 and the middle of 1965 he cashed tickets for them on approximately ten occasions; that without remembering the precise dates or amounts of the winning tickets, he received tickets from Cobb, turned the proceeds over to Cobb and received a commission from Cobb; that on several occasions he saw Cobb deliver the proceeds to Goldstein. Strauss identified two checks, each bearing Goldstein's signature, as representiing the proceeds of winning tickets given him by Cobb, one of which was the subject of Count 4 of the indictment, and testified that in the course of both transactions he turned over the proceeds to Cobb and received a commission from Cobb.

Siovitz testified that after a conversation with Cobb on August 21, 1965, he cashed in 1965 and 1966 winning twin

double tickets for two groups of people, one of which was Cobb and Goldstein. He then identified twelve separate cashings which formed the basis for the substantive counts 2, 3, and 5 through 14. He also stated that he received a check from the racetrack on each occasion and identified each such check at the trial. All the checks, except the one relating to Count 10, bore the endorsement of Goldstein. He further testified that Goldstein gave him the tickets and received the proceeds on some but not all occasions; that he was uncertain whether Cobb gave him any of the tickets but that Cobb "probably" paid him a commission on some of the transactions, and that he cashed a ticket which he received from Cobb after he had seen Goldstein give the ticket to Cobb, identifying the check received, which bore Goldstein's signature. He added that on November 8, 1967, he met with Goldstein and Cobb at Madison Square Garden and was urged by Goldstein not to tell a grand jury before which Siovitz was scheduled to testify that he, Siovitz, had cashed the tickets for Goldstein.

Steinberg, the third casher-witness, testified that he saw Goldstein and Cobb together at Yonkers Racetrack and Roosevelt Raceway on numerous occasions during 1965 and 1966, and that on approximately thirteen occasions he cashed winning twin double tickets for Goldstein. He gave no further testimony as to Cobb's role, if any, in the transactions.

Agent Schatz testifi d that Cobb admitted to him that he had given winning twin double tickets to other persons to cash, although Cobb would not sign a written statement to that effect.

Steinberg's Testimony

Cobb argues that the court erred in admitting Steinberg's testimony without a curative instruction to the jury that such testimony was to be considered only as against Goldstein, and that the proof showed separate conspiracies with Goldstein as the "hub" and the three casher-witnesses and Cobb as individual "spokes" in the conspiratorial wheel. He maintains that he was in no way linked to the claimed Goldstein-Steinberg conspiracy and that Steinberg's testimony was therefore prejudicial to him in convicting him of conspiracy, citing *Kotteakos* v. *United States*, 328 U.S. 750 (1946). We disagree.

The indictment charged and the proof showed a single conspiracy on the part of Goldstein and Cobb to hire various cashiers to dispose of winning twin double tickets. The testimony of Strauss and Siovitz was more than ample to support a jury finding that in 1965 and 1966 Goldstein and Cobb were engaged in a single enterprise for the benefit of themselves and one or more unnamed principals. There was no evidence indicating that Cobb had withdrawn from the conspiracy in 1965 or 1966, and accordingly it was proper for the jury to find that the Goldstein-Steinberg transactions occurred in furtherance of the Cobb-Goldstein conspiracy and to charge Cobb with Goldstein's conduct in reaching its verdict.

Kotteakos v. *United States, supra,* is totally inapposite to the facts in this case. In *Kotteakos* the court reversed the convictions of defendants charged with a single conspiracy to obtain fraudulent government loans through the services of a common "hub" co-conspirator. There, each loan applicant was bent on obtaining such a loan for him-

self and was in no way connected with the other loan applicants. In contrast, the defendants' conspiracy herein had as its object a "single unified purpose" or "common end," i.e., the cashing of winning tickets while concealing from the Government the identity of the true recipient. See *United States* v. *Rosenberg,* 195 F.2d 583, 600 (2d Cir. 1952), *cert. denied,* 344 U.S. 838 (1952); *United States* v. *Lloyd,* 425 F.2d 711 (5th Cir. 1970); *Blumenthal* v. *United States,* 332 U.S. 539 (1947).

The *Pinkerton* Charge

Cobb urges that the trial court erred in submitting to the jury the twelve substantive counts in which only Goldstein was directly implicated. These counts were based upon the testimony of Siovitz, relating to certain Goldstein-Siovitz transactions, and were submitted to the jury against Cobb on the authority of *Pinkerton* v. *United States,* 328 U.S. 640 (1946). However, as we have noted, the jury was unable to reach a verdict as to Cobb on these counts. Despite this failure, Cobb insists that he was prejudiced by the mere submission of the counts to the jury. Under *Pinkerton,* evidence of substantive crimes committed by one conspirator in furtherance of the conspiracy is sufficient to sustain the conviction of the other conspirators on the same substantive offenses, even though there is no evidence of direct participation by the other conspirators in the substantive offenses. In view of the fact that there was ample evidence to establish a Cobb-Goldstein conspiracy for the years 1965 and 1966, it was perfectly proper for Judge Cooper in his charge to the jury to submit these twelve counts as against Cobb. See *United States* v.

Kellerman, 431 F.2d 319 (2d Cir. 1970), *cert. denied*, 400 U.S. 957 (1970).

Even were we to assume the existence of a separate Goldstein-Siovitz conspiracy, Cobb was not convicted on any of the *Pinkerton* counts, and consequently we find no resulting prejudice to him by their submission to the jury. Cobb's conviction on the substantive Count 4 was clearly established by the testimony of Strauss with respect to the transactions Strauss had with Cobb on September 2, 1965. His assertions that he was nonetheless prejudiced in that those jurors who voted to convict on the *Pinkerton* counts must have been influenced by the submission of those counts in voting to convict him on the two counts on which he was convicted is totally without merit.

Charge Concerning Confessed Perjurers

Finally, Cobb claims error in the court's instruction to the jury governing the testimony of admitted perjurers. Two of the Government's witnesses, Siovitz and Strauss, were admittedly perjurers and accomplices. In addition to giving a full charge on the question of credibility of witnesses in general, Judge Cooper gave the following charge covering perjured witnesses and accomplices:

> "As you contemplate the testimony before you of a confessed perjurer, I would suggest you might consider whether he presented an instance of purge, p-u-r-g-e or perjury. Was his testimony induced by a genuine desire to purge or clease himself of past transgressions and make amends, or did he renew the false swearing indulged in before? In other words, to use the vernacular, did he come clean before you?"

> "And so if you find the testimony of any of these accomplices was deliberately untruthful, reject. If upon a cautious and cereful examination you are satisfied that the [accomplice] withnesses have given a truthful version and the government has sustained its burden of proof beyond a reasonable doubt in all other respects as outlined in my instructions, then you have sufficient proof on which to bring in a verdict of guilty. Otherwise, the defendants are entitled to an acquittal."

In his summation counsel for Cobb also stressed the care with which the jury should assess the testimony of admitted perjurers. While the court did not follow the language requested by Cobb concerning the evaluation of the testimony of admitted perjurers, it did caution the jury to ascertain whether the perjurer was renewing his false swearing and at the same time to subject the testimony of Strauss and Siovitz as accomplices to "a cautious and careful examination." Viewed as a whole, we conclude that the court's charge was sufficiently clear to place the jury on guard with respect to the testimony of these two witnesses.

Affirmed.

APPENDIX B

Judgment of Affirmance of the United States Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of August one thousand nine hundred and seventy-one.

Present:

HON. WILFRED FEINBERG,

HON. WALTER R. MANSFIELD,

Circuit Judges,

HON. JOHN R. BARTELS,

District Judge.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ARTHUR J. COBB and ABRAHAM GOLDSTEIN,

Defendants,

ARTHUR J. COBB,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO

Clerk

(SEAL)

A true copy,

A. DANIEL FUSARO

Clerk

By: VINCENT A. CARLIN

Chief Deputy Clerk

APPENDIX C

Order of the United States Court of Appeals Denying Rehearing

UNITED STAATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

ARTHUR J. COBB and ABRAHAM GOLDSTEIN,

Defendants,

ARTHUR J. COBB,

Defendant-Appellant.

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate and to continue bail pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellant Arthur J. Cobb,

Upon consideration thereof, it is

Ordered that said petition for a rehearing be and it hereby is denied.

The petition to stay the mandate and to continue bail is granted, pursuant to the conditions set forth in FRAP 41(b).

WILFRED FEINBERG, U.S.C.J.

WALTER R. MANSFIELD, U.S.C.J.

JOHN R. BARTELS, U.S.D.J.

September 3, 1971

APPENDIX D

Statutes Involved

Title 26, United States Code, Section 7206(2)

§ 7206. FRAUD AND FALSE STATEMENTS

Any person who—

(2) *Aid or assistance.*—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document;

Title 28, United States Code, Section 1254(1)

§ 1254. COURTS OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree:

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for

the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 30
Federal Rules of Criminal Procedure

RULE 30. INSTRUCTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless the objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

As amended Feb. 28, 1966, eff. July 1, 1966.